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Yap Ah Chye v Bei Zhan Restaurant Sdn Bhd

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HIGH COURT (MELAKA) — CIVIL APPEAL NO MA-11B-2–04 OF 2022
MOHD RADZI ABDUL HAMID J
28 FEBRUARY 2023

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Tort — Occupier's liability — Duty of care — Octogenarian fell and broke arm whilst climbing steps to enter defendant's restaurant — Steps of stairs were of unequal height caused by sinking of land where restaurant was located — Defendant restaurant owner who knew about sinking problem had previously built intermediate step to bridge growing gap between first and third steps — Whether defendant owed duty of care to ensure patrons who came to restaurant were safe when they used the stairs — Whether defendant should have put up warning notices, affixed luminous strips on the stair steps or fixed hand railings at the stairs — Whether plaintiff in view of advanced age owed duty to himself to avoid risk of fall — Whether plaintiff could have sought help when using the stairs or used wheelchair ramp to enter restaurant — Whether plaintiff contributed to own accident by using defective stairs unaided

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The plaintiff ('P') was an 80 year old man who fell and broke his right arm whilst ascending a short flight of stairs in front of the defendant's restaurant where he was going for dinner. P had frequented the restaurant many times before, but on that fateful evening he fell as he was trying to step on to the third step of the stairs from the second. P claimed that his fall was caused not only by the unequal height between the steps on the stairs but a host of other things such as the steps being cracked and slippery from dirt, dust and sand, poor lighting in the area and the absence of hand railings. P sued the defendant ('D') in the magistrate's court for damages claiming that D had breached its duty of care to him as a customer to ensure that the stairs in question were safe for use. D denied P's allegations and said since P had come to the restaurant many times before he would have known what the condition of the stairs was like. In view of P's age, D said P owed a duty to himself to avoid the risk of falling. Hence, P was partly blameworthy for the injuries he suffered. Following a trial, where DW1 and DW2 testified for D, the magistrate dismissed P's claim on the grounds, inter alia, that: (a) P's failure to adduce expert evidence to prove that the steps on the stairs were unequally distanced absolved D of any duty to warn users of any danger inherent in the stairs; and (b) since P had frequented D's restaurant many times previously, the stairs did not pose an unusual danger to P. In the instant appeal, P said the magistrate erred in failing to consider DW2's admission during the trial that the steps of the stairs were unequally distanced and therefore P had no obligation to adduce expert evidence to prove that fact.

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Held, setting aside the magistrate's decision, holding P partly liable for the damages he suffered and apportioning liability between D and P in the proportion 70:30:

(1) DW2's express admission, as owner of the restaurant, that the stair risers were uneven was sufficient evidence of that fact and therefore it was not necessary for P to have called experts to prove that fact. That admission was not explained away during re-examination by D's counsel and rendered the admission the best evidence. Apart from that admission, the photographs of the stairs clearly showed the unevenness of the stairs between the second and third risers. The magistrate therefore erred when she failed to take into consideration DW2's admission when she found that the unevenness of the stairs was not proven (see para 15).

(2) DW1 and DW2 testified that the land where the restaurant was located was reclaimed land that had been continuously sinking which made it necessary for a midway riser to be built to bridge the gap between the first and third risers. The dimensions between the second and third risers were not equal and that created the unevenness that P complained of. This court was of the view that the unevenness in the riser heights posed an unusual danger to users and D had a duty to take sufficient steps to ensure the safety of users such as by posting warnings or notices, affixing luminous stickers at the steps or installing hand railings at the stairs. Although the stairs was at the walkway outside the walls of the restaurant, D had control over the stairs as it was directly connected to the building and D maintained its cleanliness. The fact that D had constructed the additional riser to the stairs proved that it had control over the stairs (see paras 16–17 & 22).

(3) D had clearly breached its duty of care towards P as its invitee. That duty was not negated by the fact that P was a frequent visitor to the restaurant and was well aware of the condition of the stairs. The defence of volenti not fit injuria was not pleaded in this case and therefore any argument that P had assumed all risks in visiting the restaurant knowing of the physical condition of the stairs could not come into play (see paras 24–26).

(4) There were marked inconsistencies in P's evidence when his police report, his witness statements and his testimony at the trial were evaluated together. This was because P had not only attributed his fall to the unevenness in the risers of the stairs but also to slipperiness of the steps caused by dirt, sand and dust as well as due to cracks in the steps. All these three conditions were distinct and different from each other. This court did not find any evidence to prove that at the material time the steps of the stairs were slippery due to dust, dirt and sand or that they were so cracked that it posed a danger to users (see paras 28–32 & 33).

(5) Considering all the evidence and the facts, this court was of the view that P was not without blame as he chose to use the stairs despite knowing of its condition. Given his age, P owed himself the duty to prevent the risk of a fall. He could have gotten help from others to safely ascend the stairs or he could have used the ramp meant for wheelchair users. As pleaded by D, P was contributorily negligent for his accident. On the evidence, this court found D to be 70% liable and P 30% liable (see paras 35–38).

[Bahasa Malaysia summary

Plaintif ('P') adalah seorang lelaki berusia 80 tahun yang terjatuh dan patah tangan kanannya semasa menaiki tangga kecil di hadapan restoran defendan tempat dia pergi untuk makan malam. P seringkali ke restoran tersebut sebelum ini, tetapi pada petang yang malang itu dia terjatuh ketika dia cuba melangkah ke anak tangga ketiga dari tangga kedua. P mendakwa bahawa beliau jatuh bukan sahaja disebabkan oleh ketinggian yang tidak sama rata di antara anak tangga tetapi pelbagai perkara lain seperti anak tangga yang retak dan licin akibat kotoran, habuk dan pasir, pencahayaan yang kurang di kawasan itu dan ketiadaan pemegang pagar. P menyaman defendan ('D') di mahkamah majistret untuk ganti rugi dengan mendakwa bahawa D telah melanggar tugas berhati-hati beliau sebagai pelanggan untuk memastikan tangga berkenaan selamat digunakan. D menafikan dakwaan P dan berkata memandangkan P sudah banyak kali datang ke restoran itu sebelum ini dia sepatutnya tahu bagaimana keadaan tangga itu. Memandangkan umur P, D berkata P mempunyai tugas berhati-hati kepada dirinya untuk mengelakkan risiko terjatuh. Oleh itu, P sebahagiannya patut dipersalahkan atas kecederaan yang dialaminya. Selepas perbicaraan, di mana DW1 dan DW2 memberi keterangan untuk D, majistret menolak dakwaan P atas alasan, antara lain, bahawa: (a) kegagalan P untuk mengemukakan keterangan pakar untuk membuktikan bahawa anak tangga di tangga adalah jarak yang tidak sama rata membebaskan D daripada sebarang tugas untuk memberi amaran kepada pengguna tentang sebarang bahaya yang wujud di tangga itu; dan (b) memandangkan P telah berulang kali ke restoran D sebelum ini, tangga itu tidak mendatangkan bahaya luar biasa kepada P. Dalam rayuan semasa, P berkata majistret terkhilaf kerana gagal mempertimbangkan kemasukan DW2 semasa perbicaraan bahawa langkah tangga itu tidak sama jaraknya dan oleh itu P tidak mempunyai kewajipan untuk mengemukakan keterangan pakar untuk membuktikan fakta itu.

Diputuskan, mengetepikan keputusan majistret, memutuskan bahawa P bertanggungjawab sebahagiannya untuk ganti rugi yang dialaminya dan membahagikan liabiliti antara D dan P dalam perkadaran 70:30:

(1) Pengakuan nyata DW2, sebagai pemilik restoran, bahawa anak tangga tidak rata adalah keterangan yang mencukupi untuk fakta itu dan oleh itu P tidak perlu memanggil pakar untuk membuktikan fakta itu.

Pengakuan itu tidak dijelaskan semasa pemeriksaan semula oleh peguam D dan menjadikan pengakuan itu sebagai keterangan terbaik. Selain daripada pengakuan itu, gambar-gambar tangga jelas menunjukkan ketidaksamaan tangga antara anak tangga kedua dan ketiga. Oleh itu, majistret terkhilaf apabila dia gagal mengambil kira pengakuan DW2 apabila dia mendapati ketidaksamaan tangga tidak terbukti (lihat perenggan 15).

(2) DW1 dan DW2 memberi keterangan bahawa tanah di mana restoran itu terletak adalah tanah tebus guna yang telah tenggelam secara berterusan yang menyebabkan perlunya pembinaan tengah jalan untuk merapatkan jurang antara bangun pertama dan ketiga. Dimensi antara anak tangga kedua dan ketiga adalah tidak sama dan itu mewujudkan ketidaksamaan yang diadukan oleh P. Mahkamah ini berpandangan bahawa ketidaksamaan ketinggian riser menimbulkan bahaya luar biasa kepada pengguna dan D bertanggungjawab untuk mengambil langkah yang mencukupi untuk memastikan keselamatan pengguna seperti dengan menyiarkan amaran atau notis, menampal pelekat bercahaya di tangga atau memasang pagar tangan di tangga. Walaupun tangga berada di laluan pejalan kaki di luar dinding restoran, D mempunyai kawalan ke atas tangga kerana ia bersambung terus dengan bangunan dan D menjaga kebersihannya. Fakta bahawa D telah membina anak tangga tambahan untuk tangga membuktikan bahawa ia mempunyai kawalan ke atas tangga (lihat perenggan 16–17 & 22).

(3) D telah jelas melanggar tugas berhati-hati P sebagai pelangganya. Kewajipan itu tidak dinafikan oleh fakta bahawa P adalah pengunjung yang kerap ke restoran dan sangat mengetahui keadaan tangga. Pembelaan volenti not fit injuria tidak diplidkan dalam kes ini dan oleh itu sebarang hujah bahawa P telah menanggung semua risiko apabila melawat restoran mengetahui keadaan fizikal tangga tidak boleh digunakan (lihat perenggan 24–26).

(4) Terdapat ketidakkonsistenan yang ketara dalam keterangan P apabila laporan polisnya, kenyataan saksinya dan keterangannya semasa perbicaraan dinilai bersama. Ini kerana P bukan sahaja mengaitkan kejatuhannya disebabkan ketidaksamaan anak tangga tetapi juga licin anak tangga yang disebabkan oleh kotoran, pasir dan habuk serta keretakan pada anak tangga. Ketiga-tiga syarat ini adalah berbeza dan lain antara satu sama lain. Mahkamah ini tidak menjumpai sebarang keterangan untuk membuktikan bahawa pada masa material tangga tangga itu licin disebabkan oleh habuk, kotoran dan pasir atau bahawa ia sangat retak sehingga mendatangkan bahaya kepada pengguna (lihat perenggan 28–32 & 33).

(5) Dengan mengambil kira semua keterangan dan fakta, mahkamah ini berpendapat bahawa P tidak bersalah kerana dia memilih untuk

menggunakan tangga walaupun mengetahui keadaannya. Memandangkan usianya, P mempunyai tanggungjawab untuk mengelakkan risiko terjatuh. Dia boleh mendapatkan bantuan daripada orang lain untuk menaiki tangga dengan selamat atau dia boleh menggunakan tanjakan yang dimaksudkan untuk pengguna kerusi roda. Seperti yang diplidkan oleh D, P telah menyumbang secara cuai atas kemalangannya. Atas keterangan, mahkamah ini mendapati D 70% bertanggungjawab dan P 30% bertanggungjawab (lihat perenggan 35–38).]

Cases referred to

Amer Singh @ Mohinder Singh v Kelana Resorts Sdn Bhd [2007] 8 MLJ 175, HC (refd)
Teh Eok Kee & Anor v Tan Chiah Hock & Anor [1995] 3 MLJ 613, SC (refd)
Convey v State of Queensland [2017] QSC 023, SC (folld)
Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234, SC (refd)
Hamizan bin Abd Hamid v Wong Kok Keong & Anor [1994] 3 MLJ 630; [1994] 4 CLJ 122, HC (refd)
Indermaur v Dames (1866) LR ICP 274 (refd)
Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors [1983] 2 MLJ 51, FC (folld)

Legislation referred to

Uniform Building By-Laws 1984 by-law 107(1)

Ng Aik Beng (AB Ng & Assoc) for the appellant.
Mohana Krishnan a/l Ramachandran (Mohana Krishnan) for the respondent.

Mohd Radzi Abdul Hamid J:

MATTER BEFORE THIS COURT

[1] This an appeal by the plaintiff ('appeal') against the decision of the magistrate who had dismissed his claim against the defendant for a breach of duty of care allegedly owed by the defendant as the occupier of a restaurant premises known as Bei Zhan Restaurant located at Taman Kota Laksamana, Melaka ('restaurant') to the plaintiff as a customer. Parties will be referred to as how they appeared in the trial.

BRIEF BACKGROUND FACTS

[2] The plaintiff had gone to the restaurant on 21 February 2021 to enjoy dinner with his family. At the material time, the plaintiff was 80 years old. It was a restaurant frequented by the plaintiff on many occasions before. He arrived at the restaurant at approximately 7.40pm.

[3] To enter the restaurant one could choose to go up a short flight of stairs in front of the main entrance or use a ramp that was built to provide access to those using wheelchairs. The plaintiff chose to use the steps. As he moved from the second to the third step, he fell to the ground and consequently suffered a fracture at the mid shaft of his right humerus and soft tissue swelling at the right arm. He was admitted to the Pantai Hospital, received treatment and was discharged on 25 February 2021.

[4] The fact of the fall and the nature of the injuries suffered by the plaintiff was not disputed.

EACH PARTIES' CASE

The plaintiff

[5] Essentially, it was the plaintiff's case as set out in the statement of claim and reply to the defendant's amended statement of defence, as found in Part A, Vol 1 of the record of appeal and as further set out in evidence in paras 8, 10 and 11 of his witness statement (WSSP2A and 2B) was that he fell because of:

(a) of the unevenness of height between the risers of the stairs;

(b) there was no warning sign or colored stripes affixed to the stairs to warn users of the unevenness of the risers;

(c) there were no hand railings to assist the plaintiff in ascending the stairs;

(d) the lighting of the general area of the stairs was dim;

(e) the stairs was slippery because of dirt, dust and sand;

(f) there was a crack on the steps;

(g) there was a failure by the defendant to generally maintain the safety of the stairs; and

(h) there was a failure by the defendant to generally provide a safe environment for customers who patronized the restaurant.

The defendant

[6] The defendant's case, as testified by DW1 and DW2 was that:

(a) there was no failure breach of duty of care by the defendant to provide a safe environment for its customers;

(b) there was no evidence through any expert witness proving that the risers were in fact uneven;

(c) there was no breach of any law with regards to the non-provision of hand railings at the stairs since the risers of the steps were less than four;

(d) there was no evidence proving that there were cracks on the steps and even if there were, they were not of such nature that posed any danger to its users;

(e) there was no evidence of the presence of sand, dust or dirt that caused the steps to be slippery; and

(f) the general area of the entrance to the restaurant was sufficiently lit and made brighter by LED street lights near the restaurant.

DECISION AT THE CONCLUSION OF THE TRIAL

[7] At the conclusion of the trial the magistrate dismissed the plaintiff's claim on reasons. The magistrate dismissed the plaintiff's claim at the conclusion of the trial for the following reasons:

(a) the plaintiff failed to prove through any independent expert evidence that the stairs risers were in fact of uneven height;

(b) since the plaintiff failed to prove that fact, there was no duty on the defendant to place any colored stripes on the steps to draw attention of users to the unevenness of the risers;

(c) it followed that there was no duty on the defendant owed no duty to prevent damage from unusual dangers which that the defendant, as the occupier, knew or should have known; was aware of or should have been aware of;

(d) there was familiarity of with the use of the stairs by the plaintiff since he had frequented the restaurant and therefore the steps did not pose any unusual danger to the plaintiff; and

(e) there was no adverse inference arising from the defendant's failure to produce as evidence a CCTV recording of the what had transpired at the scene where the plaintiff fell.

THE GROUNDS OF APPEAL AND ISSUES

[8] The grounds of the plaintiff's appeal appear in the memorandum of appeal at Vol 1 of the record of appeal and the additional memorandum of appeal at the supplemental record of appeal.

[9] Essentially, the grounds for this appeal reflects the same matters stated in the plaintiff's statement of claim and reply to the defendant's amended statement of defence as found in Part A, Vol 1 of the record of appeal.

[10] After hearing arguments of parties, the issues that arose for determination are no different than from those raised at the trial. In challenging the decision of the magistrate in this appeal, learned counsel for the plaintiff submitted that the magistrate had erred on two principal points. Firstly, she failed to appreciate DW2's admission that the risers were uneven, and therefore there was no requirement for the plaintiff to call any expert witness to prove that fact. Secondly, she failed to find that because the stairs risers was admitted by DW2 to be uneven, there was a duty on the defendant to provide sufficient warnings such as colored stripes affixed to the risers.

[11] Learned counsel for the plaintiff placed heavy reliance on the Australian case of *Convey v State of Queensland* [2017] QSC 023 where it was decided that the defendant had owed the plaintiff the duty to affix strips on the nose of the stairs to warn of the dimensional inconsistency of the stairs, notwithstanding that the plaintiff was an employee who was familiar with the use of the stairs in question.

DELIBERATIONS BY THIS COURT

The general duty of care by an occupier to parties entering premises

[12] In the case of *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234, the Supreme Court categorised into four distinct groups the type of visitors to a premise. A customer to a shop is regarded as an invitee:

> Speaking of plaintiffs entering premises, the liability of occupiers of such premises to take care exists but it depends on the character in which they have entered them. First, we have people who enter them by virtue of a contract, such as a guest in a hotel; *secondly, we have people who enter them on business of interest, both to such persons as well as the occupiers, eg a customer going into a shop to view the goods, they are the invitees*; thirdly, we have persons who enter them with the express or implied permission of the occupiers, without neither a contract, nor such community of interest, they are called licensees; and fourthly, there are persons who enter as trespassers. In the order we have mentioned such persons, the duty of care is cast in a descending scale, the highest duty of care being towards persons who enter the premises by virtue of a contract down and not so high in the case of invitees and so on. Such duty of care has been spelt out at common law in each case.

[13] The duty of care owed to an invitee was described by the Federal Court in *Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors* [1983] 2 MLJ 51 as follows:

> The leading case on liability to an invitee at common law was *Indermaur v Dames* (1866) LR ICP 274 where a workman employed by a gasfitter went to a sugar refinery to test some gasburners and fell into an unfenced shaft. The occupiers of the factory were held liable for the accident and at p 288 Willes J stated the principle of the invitor's liability in tort as follows:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

This statement of the law has long been regarded as an authoritative exposition of the duty owed by an invitorto an invitee and had been consistently accepted and applied by the House of Lords in numerous cases until the Occupiers' Liability Act 1957 (which came into operation in England and Wales on January 1, 1958) which abolished the distinction between invitees and licencees and classed them all as 'visitors'. The Act, which does not apply in Malaysia, put on the occupier the same duty to all of them, viz the common duty of care (per Lord Denning in *Wheat v E Lacon Co Ltd* [1966] 1 All ER 582 at p 593). In Malaysia, the rule in *Indermaur v Dames* was applied by the Federal Court in the case of *Lau Tin Sye v Yusuf bin Muhammad* [1973] 2 MLJ 186. Special rules apply to the position of those who come as invitees upon premises. And the cause of action based on invitation is different, because it depends primarily, not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage) but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger (per Lord Wright in *Glasgow Corporation v Muir* [1943] AC 448 at p 460, 3463).

[14] Thus based on the decision in *Lee Lau & Sons* which referred to *Indermaur v Dames* (1866) LR ICP 274, the duty owed to an invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise.

Did the defendant owe the plaintiff such duty of care?

Was the stairs uneven?

[15] This appeal centers on the question of whether the stairs risers were uneven. The plaintiff had claimed in his witness statements that the stairs risers were uneven, but apart from photographic evidence tendered at the trial, there was no evidence from a qualified contractor or engineer to confirm that the stairs risers were in fact uneven. On this issue, this court is of the view that the express admission by DW2 as the owner of the restaurant that the stairs were uneven (see pp 119–120 notes of evidence, Vol 2(1), Part B of the record of appeal) was sufficient evidence of that fact (*Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613) and therefore it was not necessary for the plaintiff to call experts to prove the same. Furthermore, that admission was not

explained away in re-examination by the defendant's counsel and renders the admission the best evidence (*Amer Singh @ Mohinder Singh v Kelana Resorts Sdn Bhd* [2007] 8 MLJ 175). That admission apart, this court finds through the inspection of the photographs of the stairs at pp 246–247 and 251, Part C of Vol 2(2) of the record of appeal, the unevenness of the stairs between the second and third risers are plainly visible to the naked eye and it did not require some independent expert evidence to state a fact that was already evident on its face. Hence, in this court's view the magistrate fell into error when she failed to take into consideration DW2's admission when she found that the unevenness of the stairs was not proven.

Was the uneven stairs an unusual danger?

[16] The issue of the uneven stairs risers is peculiar in this appeal because as testified by DW1 and DW2, the land on which the shop lots where the restaurant is located was built on reclaimed land and that brought about in the sinking of the land. Due to that condition, the stairs became sunken too, and that needed which required the construction of a midway riser to bridge the gap between the first and third riser. The dimensions between the second and third riser were not equal and that created the unevenness complained of by the plaintiff.

[17] In this court's finding, that unevenness was a danger that was unusual because it was brought about by the sinking of the reclaimed land where the restaurant building was constructed on. DW2's own evidence stated that the sinking of the land was a continuing condition despite the stairs having been constructed in 2016, some five years prior to the plaintiffs mishap, and that clearly presented a risk to customers that must be prevented. Thus, the defendant was under the duty to use reasonable care to prevent damage from unusual dangers which he knows or ought to know. Although the stairs was at the walkway outside the walls of the premises, the defendant had control over the stairs as it was directly connected to the building and the defendant maintains the cleanliness of the stairs. The fact that the defendant constructed the additional riser to the stairs proves that it had control over it.

[18] In this regard, the fact that the local authorities did not raise any objections to the condition of the stairs in continuing to issue renewals of the defendant's business license at the premises does not serve to exempt the defendant's duty of care to its customers as invitees.

[19] This court therefore agrees with the finding of the court in *Convey v State of Queensland* that inconsistent riser heights constituted a danger because of the trap inherent in any inconsistency, making it difficult for someone walking up or down to judge the placement of the feet. This appeal is not just

about dangers in normal usage of stairs, but the use of stairs at a building that was constructed on reclaimed land that was still sinking. The Supreme Court of Queensland in *Corey* held:

> [25] The risk of a fall or stumble on the stairs was foreseeable and it was the obligation of the defendant as employer to 'establish, maintain and enforce' a safe place at work as part of the system of work. One of the responsibilities was accident prevention. In this context the standard of reasonable care may change 'with changing ideas of justice and increasing concern with safety in the community'. The routine ascent of a flight of stairs at the workplace which has been used without incident in the past can be the occasion of thoughtlessness, inadvertence, carelessness, inattention or misjudgement. In my view well before 31 May 2010 an employer in the position of this defendant was obliged as pad: of its duty of care to employees to 'turn its mind' to the safety of the stairway being used by its employees. An inspection by an intelligent layman would have suggested the installation of the strips at the nose of the stairs and good lighting at the very least. But the exercise of care in this case would have suggested that the stairway be examined by a competent expert, the risk of falls on stairs being obvious, and in the absence of any prior examination. If this had been done by a competent, skilled expert, the defects in the stairway I have mentioned would, in all likelihood, have been identified and could without great expense been rectified. In all these circumstances including the known use of the stairway, the likelihood of its use increasing with time and in the absence of any evidence the employer turned its mind to the safety of the stairway, I find that the defendant breached the duty of care it owed the plaintiff.
>
> [26] The duty owed to the plaintiff and other employees to ensure the safety of the stairway to the extent reasonably possible, required the capping of the stairs in the stairwell so that dimensional inconsistency was minimised in accordance with, as Dr Grigg said, 'recommended practice'. It also required the installation of the strips on the nose of the stairs and lighting of the brightness observed by the engineers. Consistent with my findings earlier 58 I find that the plaintiff's trip and stumble was caused by the defendant's breach of duty and its failure to identify and remedy the trap created by the variation in riser height.

[20] Based on that evaluation, this court finds that the magistrate failed to sufficiently consider the evidence in finding that the defendant did not owe the plaintiff a duty of care to prevent damage from unusual dangers which he knows or ought to know. There was a failure by the magistrate to take into consideration:

(a) DW2's admission on the unevenness of the stairs;

(b) the sinking reclaimed land where the restaurant is located;

(c) DW1's and DW2's knowledge about the sinking reclaimed land and its effect on the stairs; and

(d) DW2's agreement to suggestion by the plaintiff's counsel during cross-examination that the unevenness of the stairs can cause imbalance to its users.

Was there a breach of that duty?

[21] To begin with, firstly, it was admitted by DW2 that the stairs were uneven and may cause imbalance to its users. Secondly, DW2 also admitted that the unevenness of the stairs was brought about by the sinking reclaimed land where the premises is located. Thirdly, the sinking of the reclaimed land has continued to happen since 2016 when the second riser was constructed.

[22] Given all these facts, this court holds the view that the defendant had the duty to post warnings or notices such as affixing luminous stickers at the risers to warn invitees of the uneven height of the risers and install hand railings to assist invitees to ascend the stairs.

[23] Whether the stairs had four or less than four risers that could have attracted or exempted the application of by-law 107(1) of the Uniform Building By-Laws 1984 on the installation of hand rails was not crucial to the matter. The very fact, as testified by DW2 that the reclaimed land continues to sink is sufficient compelling reason to expect the defendant to install the hand railings as part of his duty of care to prevent any unusual dangers at the premises.

[24] To conclude this point, this court finds on the evidence that there was a breach of the defendant's duty of care towards the plaintiff as its invitee. There was no sufficient judicial appreciation by the magistrate of the evidence and the related issues.

Did the defendant's breach of duty cause the plaintiff to fall?

[25] It is part of the defendant's case that the plaintiff was a frequent customer of the restaurant and therefore he was well aware of the unevenness of the stairs and the absence of any hand railing. The premises therefore posed no risk of danger to the plaintiff.

[26] This court holds the view that a visitor's familiarity with a premises such as customer of a particular restaurant, a bank, a medical center or a shopping mall does not negate the duty on the occupier to use reasonable care to prevent damage from unusual dangers which he knows or ought to know. The defence of *volenti non fit injuria* was not pleaded in this case and therefore any argument that the plaintiff had assumed all risks of visiting the restaurant knowing the physical condition of the stairs cannot come into play. As was shown on *Convey v State of Queensland*, the plaintiff was an employee who had frequent access to and use of the stairs in issue and had knowledge of the uneven dimensions of the stairs, yet it did not bar the court from finding that the defendant had failed in its duty care towards the plaintiff.

[27] As such, notwithstanding that the plaintiff had testified that he had frequented the restaurant on many occasions with his family and that he had no problem using the stairs, it did not exempt the defendant from the general duty of care owed to its customers as invitees. A

[28] However, the matter does not end there. In his witness statements the plaintiff stated that he fell because the stairs were uneven, the step was slippery because of dirt, sand and dust and a crack on the step. These three conditions are very distinct. Unevenness of the stairs, that causes the inability to properly judge the correct placement of one's foot, that causes imbalance and fall, is very different from falling as a result of a slippery surface, and it is also different from falling as a result of a misstep caused by a crack on the steps crack in the stairs. So what really caused the plaintiff to fall? B C

[29] When PW2 was cross-examined by counsel for the defendant PW2 stated that he was physically fit, he did not require use of spectacles to navigate himself when visiting the restaurant and he could ascend the stairs at the restaurant on prior occasions without any assistance despite him being 80 years of age. PW2 had testified that whilst the lighting at the stairs area was dim he was familiar with it as his eyesight was good. But when he was cross-examined on how he fell PW2 stated when he stepped on the third step he found it slippery and he then fell backwards. What this court observed from the notes of evidence at pp 59–62 of Part B, Vol 2(1) of the record of appeal, when PW2 was asked about his police report where he stated he had lost his balance because of the uneven risers, PW2 repeated his answer that he slipped backwards. PW2 did not clarify that he fell because he lost his footing on the uneven risers. D E F

[30] This court further observed that there were contradictions in his evidence. Earlier in cross-examination, he testified that although the stairs area was dim, he had no problem ascending the stairs as he was familiar with the area and he could see without spectacles. Yet, later in cross-examination he said the light was so dim, he can't see and because of that he slipped back. When he was asked again about the steps being slippery PW2 stated the 'cements gone away. And then, some sands, something like that and I step on it, I slipped back'. What is to be noted is that there was no insistence by PW2 that he fell because the risers were uneven and because of that he fell. PW2's description of his falling was due to him slipping and he slipped because of the cement and step. G H

[31] Referring again to his police report, whilst in his oral evidence he testified that he fell because the steps was slippery, his report made no mention of that fact. The police report only highlighted the cause of the fall as being due to the steps being uneven, the absence of any notice or warnings on the uneven stairs and there were no hand railings. Nothing was stated about slipping because of wear and tear of cement or sand. I

[32] The significance of the absence of hand rails at the stairs in the police report was also watered down by PW2's own oral evidence when he testified that he could walk up and down the stairs of the restaurant nicely in the past without need for assistance except for the day of the incident when he slipped.

[33] Thus there were marked inconsistencies in PW2's evidence when the police report, his witness statements and his oral evidence are evaluated together. It is an established principle of law that a party is bound by the evidence of its own witness. This court does not find any evidence to prove that there were in dust, dirt and sand in such amount that had caused the surface of the steps to be slippery. It was in evidence that it did not rain on that day. As for the cracks in the steps, again there is no conclusive evidence to prove that the steps were of such nature that could have posed a danger to anyone using the stairs.

[34] However, after considering the evidence and the surrounding facts, this court finds that the plaintiff had in all probabilities slipped because he lost his balance as he was stepping up from the second to the third step. The unevenness of the height of the risers caused him to misjudge his step and he fell backwards.

[35] Nonetheless, in this court's view the plaintiff is not without blame. Notwithstanding his evidence that he is generally fit and healthy for an octogenarian and that he is familiar with the stairs leading to the restaurant, he had chosen to use the stairs knowing its uneven condition. Although he claims to be fit and healthy, it is common knowledge that health and safety risks increase with age, more so for octogenarians. Such risks include one's ability to maintain balance and mobility when ascending uneven surfaces. Therefore, the plaintiff owed himself the duty to prevent any risks of falling whilst using the stairs by getting the assistance of others to safely ascend the stairs or, alternatively, use the ramp meant for those using wheel chairs.

Contributory negligence

[36] This court finds that at para 6 of the statement of defence, the defendant had pleaded contributory negligence when it stated that the accident was wholly or substantially contributed by the plaintiff. It was not the duty of the plaintiff to plead contributory negligence since contributory negligence is a defence (see *Hamizan bin Abd Hamid v Wong Kok Keong & Anor* [1994] 3 MLJ 630; [1994] 4 CLJ 122) and it is relevant in determining apportionment of liability and damages. Once it is pleaded it becomes an issue to be determined by the trial court.

CONCLUSION AND DECISION

[37] This court concludes that on the balance of the probabilities the plaintiff had succeeded in proving that the defendant had a duty of care towards the plaintiff and that the defendant breached that duty when they failed to provide warnings or notices to customers on the unevenness of the risers such as by way of affixing luminous strips at the risers a and installing hand railings. However, on the evidence, this court finds that the defendant was not was solely negligent and liable for the injuries suffered by the plaintiff. The plaintiff was also contributorily negligent for the fall and injuries.

APPORTIONMENT OF LIABILITY

[38] Following the above finding, this court sets aside the magistrate's decision on liability and determines that liability shall be attributed and apportioned between the plaintiff and defendant, on a 70:30 basis against the defendant. Costs in the amount of RM3,000 is ordered.

Magistrate's decision set aside and plaintiff held partly liable for damages suffered with liability apportioned between plaintiff and defendant on a 70:30 basis against the defendant.

Reported by Ashok Kumar